

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ISSAC DECRAIS HARRIS,

Petitioner,

v.

Case No. 2:08-cv-198
HON. R ALLAN EDGAR

GREG MCQUIGGIN,

Respondent.

REPORT AND RECOMMENDATION

Petitioner has filed a motion to hold the petition in abeyance to allow him to present unexhausted claims in the state courts. It appears that petitioner would like to file additional claims that were never presented in the state courts based upon alleged newly discovered evidence. Petitioner has asserted that he has received a letter from Melissa Moore showing that he has an alibi and that his attorney never interviewed his alibi witness despite his request. Petitioner testified at trial regarding his alibi claim. Petitioner has not claimed that he currently has a motion for relief from judgment pending in the state courts. In order to hold a habeas petition in abeyance, petitioner is required to file a timely affidavit showing: (1) good cause for the his failure to exhaust before filing his habeas petition; (2) that his unexhausted claims are not plainly meritless; and (3) that he has not engaged in intentionally dilatory litigation tactics. *See Rhines v. Weber*, 125 S. Ct. 1528, 1535 (2005). Petitioner has not presented such an affidavit. Petitioner has not presented the letter that he claims he received from Melissa Moore. Petitioner claims that his attorney never contacted Melissa Moore, never issued a subpoena for her attendance at trial, and did not call Melissa Moore as a witness. Petitioner has attached a copy of a subpoena dated April 29, 2005, for Melissa Moore

to testify on May 4, 2005. It is not clear what that subpoena was for because the trial was on June 14, 2005. It appears that Melissa Moore may have been involved in the crime as the driver of the vehicle while petitioner was committing the robbery. It is not clear from the record whether Melissa Moore was charged with a crime. Petitioner testified that Melissa Moore wanted to come to his trial to testify, but that she could not make it to the trial. Clearly, this is not a situation where petitioner has recently discovered new evidence. Petitioner was aware of Melissa Moore and the alibi claim.

Accordingly, it is recommended that petitioner's motion to hold petition in abeyance (Docket #29) be denied.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within 14 days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley

TIMOTHY P. GREELEY

UNITED STATES MAGISTRATE JUDGE

Dated: November 2, 2010